

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayner
Marshall Johnson
Ken Nickolai
Thomas Pugh
Phyllis A. Reha

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Department of Commerce's
Formal Complaint and Request for
Commission Action

ISSUE DATE: May 19, 2006

DOCKET NO. P-442, 5243, 5934, 5681, 6287,
5656, 5936, 6144, 5542, 5981, 5720/C-05-1282

ORDER APPROVING STIPULATIONS AND
DISMISSING VARIOUS COMPLAINTS,
AND NOTICE AND ORDER FOR HEARING

PROCEDURAL HISTORY

On December 30, 2005, the Minnesota Department of Commerce (the Department) filed a complaint alleging that certain competitive local exchange carriers (CLECs) – and AT&T Communications of the Midwest, Inc. (AT&T) in its role as an interexchange carrier (IXC) – had violated statutes and rules by conspiring to conduct business on terms inconsistent with the CLECs' tariffs.

On January 31, 2005, the Commission directed the following carriers to answer the complaint:¹

- Desktop Media, Inc. (Desktop)
- Granite Telecommunications, LLC (Granite)
- OrbitCom, Inc. (Orbit)
- New Access Communications, LLC (New Access)
- Choicetel Communications, LLC (Choicetel)
- Digital Telecommunications, Inc. (Digital)
- Tekstar Communications, Inc. (Tekstar)
- Time Warner Telecom of Minnesota, LLC (Time Warner)
- AT&T

On February 21, AT&T and Granite each filed answers.

¹ ORDER FINDING JURISDICTION, GROUNDS TO INVESTIGATE AND REQUIRING ANSWER. At the Department's request, the Commission dismissed complaints against Mainstreet Communications, LLC, and VAL-ED Joint Venture, LLP d/b/a/ 702 Communications.

On March 13, 2006, the Department filed a reply and acknowledged that settlement negotiations were underway.

On April 5, 2006, the Department filed a Stipulation and Agreement (Stipulation) that was signed by the Department and OrbitCom, New Access Communications, Choicetel, Digital, and Tekstar. On April 6, the Department filed a Stipulation that was signed by the Department and Granite. Desktop, Time Warner and AT&T did not sign a Stipulation.

The Commission met on April 11, 2006, to consider this matter. The Commission also received a letter from Desktop on this day.

FINDINGS AND CONCLUSIONS

I. Complaint

The Department alleges that AT&T conspired with certain CLECs to provide AT&T with switched access to the CLECs' local telecommunications networks on terms that were inconsistent with the terms in the CLECs' tariffs, and that were concealed from regulators and other telecommunications service providers. In so doing, the Department alleges, the CLECs discriminated by knowingly and willfully charging, demanding, collecting, and receiving payments according to untariffed rates from AT&T while offering, charging, demanding, collecting or receiving tariffed rates from AT&T's competitors. According to the Department, this practice violates Minnesota Statutes §§ 237.07, 237.09, 237.121, subdivision 4, and 237.74; and Minnesota Rules part 7812.2210, subparts 2, 3, 5 and 9; and part 7810.0500, subpart 1.

The Department asks the Commission to rule that the CLECs knowingly and intentionally violated Minnesota statutes and rules, and order them to pay a penalty of up to \$55,000 for each day of violation as provided by Minnesota Statutes §§ 237.461, subdivision 2; 237.462, subdivision 3; and 237.462, subdivision 2. The Department also notes that the Commission has the authority to suspend or revoke a CLEC's certificate of authority to provide service in Minnesota as provided by Minnesota Statutes § 237.16.

II. Positions of the Parties

A. Granite

In its reply, Granite denied that it had violated any laws or orders, reasoning that its agreement with AT&T had no binding effect because it was produced through coercion and was otherwise unenforceable. Granite subsequently entered a Stipulation with the Department, discussed below.

B. Stipulating CLECs

Granite, Orbit, New Access, Choicetel, Digital and Tekstar have each signed a Stipulation with the Department. The Department indicated that it would end its investigation of the signatories if the Commission approved the Stipulations.

The Stipulations purport to resolve all complaints against each signatory with respect to switched access charges in any written agreement that has been provided to the Department. Copies of the Stipulations are attached. In summary, the Stipulations state as follows:

- The untariffed and unapproved access rates reflected in the AT&T contracts will be superseded by new tariffed access rates to be filed by the CLECs. The CLECs agreed to file new tariffed rates for intrastate switched access services pursuant to a revenue-neutral formula within 20 days of the Commission's Order approving the Stipulations, and that any future discounts would be tariffed and offered to all IXC's. Paragraph 1.
- Signatory CLECs agree not to offer switched access service within Minnesota on terms that are unreasonably discriminatory or contrary to their filed Minnesota tariffs in accordance with Minnesota Rules, part 7812.2210, subpart 5 (but only to the extent CLEC switched access rates remain regulated by the Commission and subject to a statutory tariffing requirement). Signatory CLECs also agree to implement any future individual case-based (ICB) pricing for switched access services by submitting tariffs for Commission approval pursuant to Minnesota Rules, part 7812.2210, subpart 5B. Paragraph 2.
- The Stipulations do not address the status of the untariffed/unapproved access charges on a retroactive basis. Signatories state that the Stipulations should not invalidate any multi-state contract or tariffed rate applicable in other jurisdictions, or any tariffed intrastate switched access rates in Minnesota that took effect prior to the date the Commission approves the Stipulations. Paragraph 4.
- Signatory CLECs agree not to initiate any further legal or regulatory action to enforce the rates set forth in the agreements at issue in the proceeding with respect to the Minnesota intrastate jurisdiction. Paragraph 6.
- While the Stipulations require CLECs to make specified payments to the State Treasury, paragraph 13 states: "This Settlement does not imply, nor does any Party to this Settlement Agreement admit, any violation of law, rule or Commission Order. Upon its approval by the Commission, this Settlement Agreement will have the force and effect of a Commission Order."
- Signatories ask the Commission to approve the Stipulations and dismiss with prejudice the complaint against any party to the Stipulations with respect to switched access charges in any written agreement that has been provided to the Department. Paragraph 8.
- Finally, signatories state that the Stipulations do not provide any third party with any remedy, right or privilege. Paragraph 11.

C. Desktop

Desktop did not answer the Department's complaint or enter a settlement, but Desktop submitted a letter and appeared at the hearing. Desktop denies discriminating in the rate it charged for switched access. Desktop acknowledged having charged a rate lower than its tariffed rate, but alleges that it charged this rate uniformly to all carriers, and that it stopped the practice in 2005.

Desktop acknowledged that AT&T had begun paying Desktop on the basis of the contract rate rather than on the basis of Desktop's tariffed rates reflected in Desktop's bills; Desktop indicated that it was considering whether to take action to recover the full tariffed amounts from AT&T.

D. Time Warner

Time Warner did not answer the Department's complaint, enter a settlement or appear at the hearing.

E. AT&T

AT&T denies that it has violated any applicable statute or rule. Moreover, AT&T denies that the Department has alleged that it has. Instead, AT&T argues that the Department's complaint are aimed exclusively at wrongdoing by CLECs.

AT&T argues that it has merely entered into individualized contracts that provide for volume discounts, among other things, as authorized by statutes and rules. AT&T denies that it required the CLECs to keep the contracts secret, noting that the contract terms direct CLECs to take whatever steps necessary to obtain any required regulatory approval. According to AT&T, the confidentiality clauses in the contracts merely require CLECs to give AT&T prior notice of any disclosure so that AT&T would have the opportunity to try to defend the confidentiality of its data as appropriate.

Finally, AT&T denies that the Commission has the authority to grant the relief sought by the Department.

F. The Department

The Department asks the Commission to adopt the Stipulations and to proceed with the complaint against the remaining parties. The Department denies the defenses asserted by AT&T. Moreover, because the Department asks the Commission to abrogate the switched access contracts in this case, the Department seeks to keep AT&T in the case to forestall future objections that AT&T lacked the opportunity to defend its interests in the contracts.

G. Qwest Corporation

Qwest Corporation (Qwest) appeared at the hearing to express its interest as a potential victim of the CLECs' discriminatory rates. Qwest stated that it could not offer an opinion on this matter because it had not yet seen the relevant contracts and other documents that formed the basis of the Department's complaint. Regardless of the outcome of the complaint, Qwest asked that the Commission ensure that these documents be made public.

IV. Commission Analysis and Action

A. Regarding Stipulating Parties

The Stipulations are in the nature of a settlement. Minnesota Statutes § 237.076 authorizes the Commission to accept a settlement upon a finding that it is in the public interest and is supported by substantial evidence.

The Stipulations promote fair and open competition by assuring that all IXC's will have access to the same tariffed rates or, if the CLEC proposes to offer ICB rates, that those rates will be offered pursuant to a Commission-approved tariff that states the conditions under which the new terms are available. Such an arrangement assures that ICB rates will be fairly available to all who meet the

conditions that justify the rate. This promotes fair and open competition by limiting the power of the largest IXC's to disadvantage smaller IXC's by securing rates that reflect their negotiating power rather than characteristics that truly justify lower rates.

The Commission has no wish to discourage telecommunications providers from negotiating mutually agreeable terms for conducting business; the Commission merely seeks to ensure that these agreements conform to law and are otherwise consistent with the public interest. The Commission is persuaded that the proposed Stipulations – filed with the Commission, subject to notice and comment, and establishing nondiscriminatory rates to be filed in the CLECs' tariffs – meet these criteria.

Additionally, signatories to the Stipulations agree to reduce their tariffed rates for switched access. While reducing switched access rates is not the primary objective of this docket, the benefits of these reductions will flow to IXC's operating throughout Minnesota and, indirectly, to their customers. Only AT&T, which had already secured the benefits of lower switched access rates thorough unfiled agreements, will fail to benefit from this arrangement.

Having reviewed the record and heard the parties' oral arguments on this matter, the Commission finds that the proposed Stipulations are in the public interest and supported by substantial evidence. Accordingly, the Commission will approve the Stipulations and require their implementation.

In particular, at hearing no party objected to authorizing disclosure of their contracts, but each party alleged that the other party to the contract impeded such disclosure. To ensure this matter is pursued to resolution, the Commission will direct all signatories to provide for publicly disclosing the documents underlying this dispute, or show cause why the documents should not be disclosed.

B. Regarding Desktop, Time Warner and AT&T

1. Jurisdiction and Referral for Contested Case Proceedings

The Commission has jurisdiction over the provision of intrastate telecommunications services under the Minnesota Telecommunications Act, Minnesota Statutes Chapter 237, including §§ 237.035(e), 237.081, 237.16, 237.461, 237.462, and 237.74, and Minnesota Rules parts 7811.2210 and 7812.2210.

The Department asks the Commission to proceed with its complaint against Desktop, Time Warner and AT&T. The Commission finds this a reasonable request and will grant it, but also finds that it cannot resolve all the issues raised in the Complaint on the basis of the record before it. Those issues, including the magnitude of any penalties, turn on specific facts that are best developed in formal evidentiary hearings. The Commission will therefore refer the matter to the Office of Administrative Hearings for contested case proceedings.

2. Issues to be Addressed

The issues in this case are whether Desktop, Time Warner, AT&T, or any combination thereof have violated Minnesota statutes and rules in the provision of intrastate switched access services and, if so, what remedial action the Commission should take. In response to the concerns raised by AT&T, the Commission will authorize the Department to amend its complaint as appropriate.

The parties shall address the above issues in the course of contested case proceedings. They may also raise and address other issues relevant to the Complaint.

3. Procedural Outline

a. Administrative Law Judge

The Administrative Law Judge assigned to this case is Steve M. Mihalchick. His address and telephone number are as follows: Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota 55401-2138; (612) 349-2544.

b. Hearing Procedure

- *Controlling Statutes and Rules*

Hearings in this matter will be conducted in accordance with the Administrative Procedure Act, Minnesota Statutes §§ 14.57-14.62; the rules of the Office of Administrative Hearings, Minnesota Rules parts 1400.5100 to 1400.8400; and, to the extent that they are not superseded by those rules, the Commission's Rules of Practice and Procedure, Minnesota Rules parts 7829.0100 to 7829.3200.

Copies of these rules and statutes may be purchased from the Print Communications Division of the Department of Administration, 660 Olive Street, St. Paul, Minnesota 55155; (651) 297-3000. These rules and statutes also appear on the State of Minnesota's website at www.revisor.leg.state.mn.us.

The Office of Administrative Hearings conducts contested case proceedings in accordance with the Minnesota Rules of Professional Conduct and the Professionalism Aspirations adopted by the Minnesota State Bar Association.

- *Right to Counsel and to Present Evidence*

In these proceedings, parties may be represented by counsel, may appear on their own behalf, or may be represented by another person of their choice, unless otherwise prohibited as the unauthorized practice of law. They have the right to present evidence, conduct cross-examination, and make written and oral argument. Under Minnesota Rules, part 1400.7000, they may obtain subpoenas to compel the attendance of witnesses and the production of documents.

Parties should bring to the hearing all documents, records, and witnesses necessary to support their positions.

- *Discovery and Informal Disposition*

Any questions regarding discovery under Minnesota Rules, parts 1400.6700 to 1400.6800 or informal disposition under Minnesota Rules, part 1400.5900 should be directed to Roger Moy, Public Utilities Rates Analyst, Minnesota Public Utilities Commission, 121 Seventh Place East, Suite 350, St. Paul, Minnesota 55101-2147, (651) 201-2217; or Jeanne Cochran, Assistant Attorney General, 1100 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, (651) 296-2106.

- *Protecting Not-Public Data*

State agencies are required by law to keep some data not public. Parties must advise the Administrative Law Judge if not-public data is offered into the record. They should take note that any not-public data admitted into evidence may become public unless a party objects and requests relief under Minnesota Statutes § 14.60, subdivision 2.

- *Accommodations for Disabilities; Interpreter Services*

At the request of any individual, this agency will make accommodations to ensure that the hearing in this case is accessible. The agency will appoint a qualified interpreter if necessary. Persons must promptly notify the Administrative Law Judge if an interpreter is needed.

- *Scheduling Issues*

The times, dates, and places of evidentiary hearings in this matter will be set by order of the Administrative Law Judge after consultation with the Commission and intervening parties.

- *Notice of Appearance*

Any party intending to appear at the hearing must file a notice of appearance (Attachment 3) with the Administrative Law Judge within 20 days of the date of this Notice and Order for Hearing.

- *Sanctions for Non-compliance*

Failure to appear at a prehearing conference, a settlement conference, or the hearing, or failure to comply with any order of the Administrative Law Judge, may result in facts or issues being resolved against the party who fails to appear or comply.

c. Parties and Intervention

The current parties to this case are Desktop, Time Warner, AT&T and the Department of Commerce. Other persons wishing to become formal parties shall promptly file petitions to intervene with the Administrative Law Judge. They shall serve copies of such petitions on all current parties and on the Commission. Minn. Rules, part 1400.6200.

d. Prehearing Conference

A prehearing conference will be held on Wednesday, May 31, 2006, at 9:30 a.m. in the Large Hearing Room, Minnesota Public Utilities Commission, 121 7th Place East, Suite 350, Saint Paul, Minnesota 55101, (651) 296-7124.

Parties and persons intending to intervene in the matter should attend the conference, prepared to discuss time frames and scheduling. Other matters which may be discussed include the locations and dates of hearings, discovery procedures, settlement prospects, and similar issues. Potential parties are invited to attend the pre-hearing conference and to file their petitions to intervene as soon as possible.

4. Application of Ethics in Government Act

The lobbying provisions of the Ethics in Government Act, Minnesota Statutes § 10A.01 et seq., may apply to this case. Persons appearing in this proceeding may be subject to registration, reporting, and other requirements set forth in that Act. All persons appearing in this case are urged to refer to the Act and to contact the Campaign Finance and Public Disclosure Board, telephone number (651) 296-5148, with any questions.

5. Ex Parte Communications

Restrictions on ex parte communications with Commissioners and reporting requirements regarding such communications with Commission staff apply to this proceeding from the date of this Order. Those restrictions and reporting requirements are set forth at Minnesota Rules, parts 7845.7300-7845.7400, which all parties are urged to consult.

ORDER

1. The Stipulations filed in this matter on August 5 and 6, 2006, are approved, and copies are attached hereto at Attachment 1 and Attachment 2. Accordingly, the Department's complaint is dismissed as to all signatories. Parties to these Stipulations shall implement them according to their terms and, as part of their compliance filings, shall publicly disclose the documents underlying this dispute or show cause why the documents should not be disclosed.
2. The Commission hereby refers the issues raised in the Department of Commerce's Complaint against the remaining parties to the Office of Administrative Hearings for contested case proceedings, as set forth above. The Department may amend its complaint as appropriate.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling 651-201-2202 (voice) or 1-800-627-3529 (TTY relay service)

STIPULATION AND AGREEMENT

(including Attachment A, “Comparison of the Tariffed Switched Access Rates
with Proposed Switched Access Rates”)

between the Minnesota Department of Commerce and

OrbitCom, Inc.,

New Access Communications, LLC,

Choicetel Communications, LLC,

Digital Telecommunications, Inc., and

Tekstar Communications, Inc.

(April 5, 2006)

STIPULATION AND AGREEMENT

(including Attachment A, “Comparison of the Tariffed Switched Access Rates
with Proposed Switched Access Rates”)

between the Minnesota Department of Commerce and

Granite Telecommunications, LLC

(April 6, 2006)

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

100 Washington Square, Suite 1700
Minneapolis, Minnesota 55401-2138

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

121 Seventh Place East Suite 350
St. Paul, Minnesota 55101-2147

In the Matter of the Department of Commerce's MPUC Docket No. P-442, 5243, 5934, 5681,
Formal Complaint and Request for Commission 6287, 5656, 5936, 6144, 5542, 5981, 5720/C-
Action 05-1282

OAH Docket No.

NOTICE OF APPEARANCE

Name, Address and Telephone Number of Administrative Law Judge:

Steve M. Mihalchick, Office of Administrative Hearings, Suite, 1700, 100 Washington Square,
Minneapolis, Minnesota 55401; (612) 349-2544

TO THE ADMINISTRATIVE LAW JUDGE:

You are advised that the party named below will appear at the above hearing.

NAME OF PARTY:

ADDRESS:

TELEPHONE NUMBER AND E-MAIL ADDRESS:

PARTY'S ATTORNEY OR OTHER REPRESENTATIVE:

OFFICE ADDRESS:

TELEPHONE NUMBER AND E-MAIL ADDRESS:

SIGNATURE OF PARTY OR ATTORNEY: _____

DATE: _____